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Supreme Court of the United States

October Term, 1969

No. 1406

NORMAN F. DACEY & NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,
Petitioners,

against

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR STEPHEN PENN
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April 8, 1970

RICHARD E. BURNS
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INDEX TO SUPPLEMENTAL APPENDIX

	PAGE
Opinion of McLean, D. J. dated October 9, 1967	29a
Opinion of Wyatt, D. J. dated October 9, 1968	34a
Amendment dated October 11, 1968 to Opinion	50a
Judgment of United States Court of Appeals	51a
Memorandum Decision-Opinion of the New York Court of Appeals	52a
Dissenting Opinion of Appellate Division	54a
Judgment of New York Court of Appeals	64a

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Opinion of McLean, D. J. dated October 9, 1967

[SAME TITLE]

Appearance

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McLean, D.J.

This is an action to enjoin defendant New York County Lawyers' Association (the Association) from prosecuting a proceeding in the Supreme Court, New York County, in which the Association seeks to restrain plaintiff from engaging in what the Association claims to be the unlawful practice of law. Plaintiff moves for a preliminary injunction. The facts are undisputed and may be briefly summarized as follows:

Plaintiff Norman F. Dacey describes himself as a "professional estate planner." He is not a lawyer. He does business under the trade name of "National Estate Planning Council." He resides in Connecticut where at one time he engaged in giving legal advice to clients with respect to wills, trusts, and other estate matters. He was enjoined from so doing by the Connecticut courts.

Grievance Committee of the Bar of Fairfield County v. *Dacey*, 154 Conn. 129, 222 Atl. 339 (1966), *appeal dismissed*, 386 U. S. 683 (1967)

Opinion of McLean, D. J. dated October 9, 1967

Dacey has written a book entitled *How To Avoid Probate!* The book has been published and has had a wide distribution. The front cover states that the work is by "one of America's leading professional estate planners" and that it is a "publication of the National Estate Planning Council." The back cover states that "Norman F. Dacey is America's best-known professional estate planner." The book is very critical of probate courts and probate procedure. It advocates avoidance of probate by use of the inter vivos trust, which it characterizes as the "magic key to probate exemption, a legal wonder drug which will give you permanent immunity from the racket." At p. 13.

Some thirty-nine pages of this 362-page book are devoted to the author's text. The great bulk of the book consists of forms of various legal instruments, including many different declarations of trust, as well as wills, quitclaim deeds, etc. Each instrument is prefaced by "instructions" for filling it out. The instructions state that the instrument will be "suitable for use" for this or that purpose, depending on the terms of the instrument.

The back of the book contains a four-page glossary of legal terms and a convenient two-page order blank addressed to National Estate Planning Council which can be used for the purchase of additional sets of forms.

In January 1967 the Association instituted a proceeding in the Supreme Court pursuant to Section 750B of the New York Judiciary Law, seeking an order adjudging Dacey in contempt of court and enjoining him from distributing in the State of New York *How To Avoid Probate!* and the forms contained therein. The Supreme Court granted the Association's application by memorandum decision filed June 30, 1967. An order was entered

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upon this decision on September 6, 1967. It adjudged that Dacey is guilty of criminal contempt of court and imposed a fine upon him of $250. It enjoined him from assuming to practice law in the State of New York, holding himself out to the public of the State of New York as being qualified to give legal advice, representing that any form, writing, or other instrument is legally sufficient for specific legal purposes, and selling such forms. The order provides that the injunction shall apply regardless of whether the forms are distributed in conjunction with a book, but it further provides that nothing in the order shall prohibit, limit, or restrict Dacey from expressing any opinion with regard to any law, decision, procedure, or subject "not specifically hereinabove described," from communicating any information concerning the content of any such law, decision, or procedure, or from advising any change or amendment thereto.

Dacey appealed from the order of the Supreme Court to the Appellate Division, First Department. This court has been advised that subsequent to the argument of the present motion, Dacey's appeal was placed upon the calendar of the Appellate Division for argument on September 26, 1967, and that the Association has agreed not to attempt to enforce the Supreme Court's order pending the outcome of the appeal. As far as appears, the appeal has not yet been decided.

Plaintiff contends that the proceeding in the New York court and the order of the New York court violates plaintiff's constitutional rights under the First and Fourteenth Amendments.

Jurisdiction of this action is alleged under 28 U.S.C. § 1331 because the action arises under the Constitution, and also under 28 U.S.C. § 1343 because the action is

based upon the civil rights statute, 42 U.S.C. § 1983, which provides that every person who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured . . . ."

In 28 U.S.C. § 2283 it is provided that:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This statute applies here, for although the injunction requested is in form one against the moving party in the state court action, in substance plaintiff seeks a stay of proceedings in the state court.

> *See Studebaker Corporation* v. *Gittlin*, 360 F. 2d 692, 696 (2d Cir. 1966)

The statute states in effect that this prohibition of an injunction does not apply where an injunction is "expressly authorized by Act of Congress." Whether the civil rights statute is such an Act of Congress within the meaning of 28 U.S.C. § 2283 has not been decided by the Supreme Court.

> *See Stevens* v. *Frick*, 372 F. 2d 378, 381 (2d Cir. 1967)

It is not necessary to decide that question on this motion, for even assuming that the civil rights statute is such an exception, and hence that 28 U.S.C. § 2283 does not bar an injunction, still the relief presently asked by

plaintiff should not be granted. On this motion we are concerned with an application for an injunction pendente lite. The court is satisfied that the moving papers do not make a sufficiently strong showing to entitle plaintiff to that relief. Plaintiff has an opportunity to raise his constitutional objections in the state court proceeding, as he is doing. If the state court overrules them, he may seek review by the Supreme Court of the United States, as he attempted to do on similar grounds in the Connecticut action.

Plaintiff has made no showing of irreparable injury. He is not at the moment prevented from selling the forms contained in his book, for the parties have agreed that the order of the Supreme Court, New York County, will not be enforced pending appeal. Moreover, in the court's opinion plaintiff has not demonstrated a strong probability of success upon the ultimate trial of this action. It is difficult for the court to see how plaintiff's rights of free speech have been infringed by a court order restraining him from giving legal advice in the manner disclosed by the record in this case.

Considerations of comity between federal and state courts also weigh heavily against the issuance of a preliminary injunction.

See Stevens v. *Frick, supra.*

The court believes that a proper exercise of its discretion required a denial of interlocutory relief in this case.

This opinion constitutes the court's findings of fact and conclusions of law.

Motion denied.

So ordered.

Dated: October 7, 1967

/s/ EDWARD C. McLEAN
U.S.D.J.

Opinion of Wyatt, D. J. dated October 9, 1968

[SAME TITLE]

Appearances:

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WYATT, District Judge,

This is a motion by defendant New York County Lawyers' Association (The Association) for an order dismissing the action because the amended complaint fails to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6).

The motion must be granted.

I.

Plaintiff Dacey, who is not a lawyer, is the author of a book "How to Avoid Probate!" (the Book). The nature

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of the Book is thus described in the amended complaint: "The Book is a strong criticism of the probate court system and lawyers engaged in trusts and estates practice and sets ways and means of avoiding both. The Book contains various forms and explanatory material dealing with decedents' estates and lifetime trusts". The Book was published in November 1965.

Defendant Association is a membership corporation organized in 1908 under the Membership Corporations Law of New York. The members of the Association are lawyers practicing in New York County; there are many such members and it is believed to be the largest bar association in the United States. (I am a member of the Association and have been for some years; after being so advised at the oral argument, plaintiff and his attorney stated that they did not suggest any disqualification.)

A membership corporation in New York is by definition "a corporation not organized for profit" (Membership Corporations Law, § 2). That law also has the following special provision for bar associations (§ 11(7)):

> "The corporate purposes of a bar association shall be cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession, cherishing the spirit of brotherhood among the members thereof, and such kindred purposes as may be stated in the certificate. The incorporators shall be members of the bar in active practice."

The Association is thus a non-profit organization of lawyers having among others the purposes just stated.

The Judiciary Law of New York gives the Supreme Court power to punish for a criminal contempt "any person who unlawfully practices or assumes to practice law"

(§ 750 B). The same section provides that a proceeding for such punishment may be instituted "on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this State".

In January 1967, the Association, acting under Judiciary Law § 750 B, filed a petition instituting a summary proceeding in the Supreme Court, New York County, to adjudge in contempt and to enjoin Dacey and also the publisher of the Book and two retail booksellers.

On June 28, 1967, Mr. Justice Marks handed down an opinion finding Dacey in contempt because he was engaged through the Book in the unlawful practice of law; Mr. Justice Marks stated in his opinion that Dacey and the other respondents should be enjoined (54 Misc. 2d 564, 282 N.Y.S. 2d 985 (Sup. Ct. 1967)).

Before a judgment had been entered on the opinion of Mr. Justice Marks, this action was commenced in this Court on August 7, 1967. The complaint averred that the decision of Mr. Justice Marks and the prosecution by the Association of the contempt proceeding was an illegal and unconstitutional restraint on the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and by the civil rights laws (42 U.S.C. § 1981 and following). The jurisdiction of this Court was said to be based on 28 U.S.C. §§ 1331 and 1343. The relief asked was an injunction restraining the Association from further prosecuting the contempt proceeding and from enforcing any injunction granted by the State Court.

A judgment on his opinion was signed by Mr. Justice Marks and entered on September 6, 1967. Plaintiff promptly appealed to the Appellate Division, First Department. The Association agreed that, pending decision

of that appeal, it would not attempt to enforce the State Court judgment.

In the case at bar, an application for a preliminary injunction was made by plaintiff to Judge McLean. On October 9, 1967, this application was denied, principally (a) because the constitutional and other claims could be, and were, raised in the State Court proceedings and (b) because, since the Association was not attempting to enforce the State Court order, there was no irreparable injury to plaintiff.

On October 24, 1967, the Appellate Division, by a vote of 4 to 1, affirmed the judgment of the New York Supreme Court as to plaintiff but modified the judgment as to the other respondents (25 A.D. 2d 161, 283 N.Y.S. 2d 984). The majority was made up of Justices Eager, Capozzoli, Tilzer and McNally, with majority opinion by Mr. Justice Eager. There was a dissenting opinion by Mr. Justice Stevens. The dissenting opinion emphasized that the publication of a book—even if it be a legal text—does not amount to the practice of law, that publication of legal forms is not the practice of law, that buying the Book is not an employment of plaintiff as a lawyer but rather an attempt by the purchaser to be his own lawyer, and that the relationship between an author and the purchaser of his book is not that of attorney and client.

On December 29, 1967, the Court of Appeals of New York reversed the order of the Appellate Division and dismissed the petition of the Association, on the dissenting opinion at the Appellate Division (21 N.Y. 2d 694, 287 N.Y.S. 2d 422). Judge Scileppi dissented and voted to affirm on the prevailing opinion at the Appellate Division.

An amended complaint was then on January 22, 1968 filed in this Court in the case at bar.

Opinion of Wyatt, D. J. dated October 9, 1968

The amended complaint no longer sought any injunction against the State Court proceeding because that had terminated favorably to plaintiff.

The amended complaint contained two claims, the first for six million dollars in actual and punitive damages and the second (on the same averments as the first) for an injunction against the Association cooperating with any groups in other jurisdictions to interfere with the plaintiff in the sale of his book or related activities.

The amended complaint avers the acts of the Association in filing its petition with the New York Supreme Court and in obtaining the judgment and order of that Court adjudging plaintiff in contempt for the unlawful practice of law and enjoining him. The amended complaint avers that the Association acted to prevent plaintiff from criticizing lawyers, judges and courts; that the Association acted to prevent sale of the Book because the public might thereby avoid the services of lawyers; that the Association acted with the intent "maliciously" to deprive the plaintiff of his means of expression and to restrict his constitutional right of free speech; that the Association acted "under color of" State law (42 U.S.C. §1983) because of the authority given it by the New York statutes to institute the contempt proceeding; and that the Association and its members "conspired" to restrict the constitutional right of plaintiff to free speech.

This motion was then made, the position of the Association being that the amended complaint is insufficient as a matter of law. This position in turn is based on a submission that the Association, when it institutes a proceeding under Judiciary Law §750 B, has an immunity from suit similar to that of judges and prosecutors,

an immunity most recently sustained by the Supreme Court of the United States in *Pierson* v. *Ray*, 386 U. S. 547 (1967).

II.

Plaintiff bases his action on 42 U.S.C. §1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress."

Plaintiff contends that the Association acted under "color" of New York Law because of the provision in Judiciary Law §750 B authorizing a "bar association" to institute the proceeding to punish for a criminal contempt the unlawful practice of law.

Despite the words of Section 1983 making it applicable to "every person", the Supreme Court has held that legislators are immune from suit under the section even for acts done with "an unworthy purpose". *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). Such immunity is not for the "private indulgence" of legislators but for the "public good" in that legislators may discharge their public duties without fear of "the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives" (341 U. S. at

377). The Supreme Court directed dismissal in *Tenney* v. *Brandhove* for failure of the complaint to state a claim upon which relief could be granted.

The Supreme Court in *Pierson* v. *Ray*, above, found that judges were immune from suit under Section 1983 even if alleged to have acted maliciously or corruptly. Again the Court pointed out that the immunity was not given to protect the judge but rather in the public interest so that a judge may decide cases independently and on principle "without fear that unsatisfied litigants may hound him with litigation charging malice or corruption" (386 U. S. at 554).

The same immunity from suit under Section 1983 is given for the same reason to quasi-judicial officials such as prosecuting attorneys and their assistants. *Fanale* v. *Sheehy*, 385 F. 2d 866, 868 (2d Cir. 1967); *Bauers* v. *Heizel*, 361 F. 2d 581 (3d Cir. 1966) cert. denied 386 U. S. 1021 (1967).

In this Circuit it was also held on the same principle that a special assistant to the Attorney General of the United States has absolute immunity from suit for malicious prosecution based on presentation of evidence to a grand jury which returned an indictment, even where the complaint averred personal malice and that as part of a malicious conspiracy the defendant had secured his appointment as a special assistant for the specific purpose of prosecuting plaintiff. *Yaselli* v. *Goff*, 12 F. 2d 396 (2d Cir. 1926), affirmed in per curiam opinion, 275 U. S. 503 (1927). The Court of Appeals stated (12 F. 2d at 404, 406, 407):

> "A United States attorney, if not a judicial officer, is at least a quasi judicial officer, of the government. He exercises important judicial func-

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tions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him. To hold that an attorney of a private client is clothed with absolute privilege, and that a public prosecutor, whose duty it is to enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence, that we cannot accept it.

• • •

"In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors to say nothing of the witnesses who testify in a case.

• • •

"In our opinion, the reasons which compel us to hold that one who obtains an appointment as a

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> prosecuting officer of the government is immune from civil liability for acts done by him in the discharge of his official duties apply in like manner to protect him against such a charge as that he was governed by improper motives in securing the appointment. The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. The one charge is as much to be feared as the other, and is equally derogatory to his public character and usefulness in the office. We are unable to distinguish between the two cases in principle."

A later suit under the civil rights laws came before Judges Learned Hand, Swan and Clark. The defendants were two successive Attorneys General of the United States, two successive directors of the Enemy Alien Control Unit of the Department of Justice and the District Director of Immigration. The complaint alleged that defendants maliciously and from personal ill will and knowing that they were acting unlawfully, deprived plaintiff of his civil rights by keeping him in custody for over four years on the pretext that he was a German enemy alien when they knew him to be French, as the Courts found when he was finally ordered to be freed. The Court of Appeals approved dismissal of the complaint for insufficiency in law because the defendants had absolute immunity from suit. *Gregoira* v. *Biddle*, 177 F. 2d 579 (2d Cir.

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1949), cert. denied, 339 U.S. 949 (1950). Judge Learned Hand had this to say (177 F. 2d at 581):

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

The many decisions granting absolute immunity to prosecuting attorneys, clerks of court, curators, and others concerned with the enforcement of the laws or with the judicial function are collected in *Bauers* v. *Heizel*, above cited at 586, footnote 7.

An interesting application, or extension, of the principle is seen in *Byrne* v. *Kyser*, 347 F. 2d 734 (7th Cir. 1965) cert. denied 383 U.S. 913 (1966). Illinois has a procedure for the confinement of those mentally ill. A petition may be filed by "any reputable citizen" averring that a named person is mentally ill; such petition must state the names of witnesses by whom the facts may be proved, at least one of whom must be a physician having knowledge of the facts. Where jury trial is not demanded, the Court must appoint a commission of two physicians to examine the person and to report to the Court. If

found by the commission to be mentally ill, the Court must commit such person. Illinois Revised Statutes, 1967, Chapter 91-½, sections 8-1, 8-7, 8-12 (formerly Ill. Rev. Stat. 1963 and 1961, ch. 91-½ §§ 5-1, 5-5, 5-10). Plaintiff alleged that such a petition was filed against him by Barish, an assistant state's attorney; that Dr. Fein and Dr. Imbiorski were the two physicians appointed by the Court to examine plaintiff and to report; that he was thereafter confined in a mental hospital; that he had never been mentally ill; that Barish, Fein, Imbiorski and other defendants had acted intentionally to deprive him of constitutional rights; and that he had a claim to damages under the civil rights laws, specifically 42 U.S.C. § 1983. The Court found that the two doctors were absolutely immune, saying (347 F. 2d at 736):

> "Drs. Fein and Imbiorski as members of the court-appointed statutory commission share the court's judicial immunity, and in the performance of their quasi-judicial functions are not subject to suit under the sections of the statute here involved."

With respect to Barish the Court said (347 F. 2d at 736):

> ". . . if it be considered that Barish acted in his official capacity as a prosecutor for the state he is afforded the same protection given a judge."

It is clear that, on principle, none of the State judges who decided against plaintiff Dacey could be sued by him under the civil rights laws. It is also clear that if a prosecuting attorney had instituted the proceedings, he also would be absolutely immune from such a suit.

Opinion of Wyatt, D. J. dated October 9, 1968

The question here is whether a different result is indicated because the proceedings were instituted, as authorized in the statute, by a "bar association".

III.

The State of New York has a strong public policy against the practice of law in the State by any person "unless he has been regularly admitted to practice, as an attorney or counsellor in the courts of record in the state" (Judiciary Law § 484).

The unauthorized practice of law in New York is a misdemeanor, a criminal offense (Judiciary Law § 485). The object of the statute making it an offense to engage in the unauthorized practice of law is "to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work . . .". *Spivak* v. *Sacho*, 16 N. Y. 2d 163, 168, 263 N. Y. S. 2d 953, 956 (1965). It had earlier been said by the highest Court in New York: "Protection of the members of the lay public of our State, when they seek *legal advice* . . . is the basis of the requirements of licensing of attorneys by the State . . .". *In re Roel*, 3 N. Y. 2d 224, 231; 165 N. Y. S. 2d 31, 37 (1957), appeal dismissed 355 U. S. 604 (1958). Still earlier, the highest Court in New York had declared (*People* v. *Alfani*, 227 N. Y. 334, 339 (1919)):

> "The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar as stated in the opinion below but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery,

dentistry and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest and knowledge reveals how it may be avoided.

"Why have we in this state such strict requirements for admission to the Bar? A regents' certificate or college degree followed by three years in a law school or an equivalent study in a law office marks the course to a bar examination which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man. And all of this with but one purpose in view and that to protect the public from ignorance, inexperience and unscrupulousness."

The Supreme Court of New York has been given power, not only over licensed attorneys, but over "all persons . . . assuming to practice law" (Judiciary Law § 90(2)).

The statutory prohibition against the unauthorized practice of law can be enforced in New York in three ways: first, by a criminal prosecution; second, by a civil action under Judiciary Law § 476-a; and third (that employed against plaintiff Dacey), by summary proceedings under Judiciary Law § 750 B to punish for criminal contempt. It has been held that a civil action is appropriate "where disputed issues of fact require a trial" but that "where the facts are undisputed, a summary proceeding may be simpler, more expeditious and more appropriate than either a criminal prosecution or civil action." *Application*

of New York County Lawyers Ass'n (In re Bercu), 273 App. Div. 524; 78 N. Y. S. 2d 209, 212, 213 (1st Dept. 1948), affirmed 299 N. Y. 728, 87 N. E. 2d 451 (1949). Since the facts in the case involving Dacey were undisputed, the Association proceeded properly in instituting a summary proceeding.

In the First Department, where the proceedings against Dacey were instituted, it is contemplated by the Appellate Division that bar associations, and specifically this defendant Association, will be active in investigating the unauthorized practice of law and, where deemed appropriate, instituting proceedings to stop such practice. A Rule (XII-A) of the Appellate Division, First Department, provides that as to three named bar associations, including this defendant Association, subpoenas shall issue on their application for a preliminary investigation of any person believed to be "unlawfully practicing or assuming to practice law"; that the evidence of witnesses at such investigation may be transcribed; and that such witnesses may be sworn. This Rule has recently been sustained as proper. *Matter of A'Hearn* v. *Committee, etc. of the New York County Lawyers Ass'n.*, 55 Misc. 2d 540, 285 N. Y. S. 2d 744 (Sup. Ct. N. Y. Cty. 1967), affirmed 30 App. Div. 2d 47, —— N. Y. S. 2d —— (3d Dept. 1968), appeal pending in the Court of Appeals.

It thus appears that the Association when it acts under Judiciary Law § 750 B is a part of the judicial process of New York. The situation at bar seems exactly the same as that of a bar association sued for damages for its activities under Court Rule which led to the disbarment of a lawyer. This happened in the State of Washington. The lawyer then sued the bar association under the civil rights laws, 42 U. S. C. § 1983. The association was held to have absolute immunity (*Clark* v. *State of*

Washington, 366 F. 2d 678 (9th Cir. 1966)), the Court saying (at 681):

> "As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an 'integral part of the judicial process' and is therefore entitled to the same immunity which is afforded to prosecuting attorneys in that state."

I am unable to distinguish the situation in *Clark* from that at bar.

The defendant Association has instituted at least two proceedings under Judiciary Law § 750 B which have resulted in final judgments enjoining in specific instances the unauthorized practice of law. *Matter of New York County Lawyers Ass'n (In re Bercu,)* above; *In re Roel,* above.

It thus appears to be clearly in the public interest that the Association be able to determine, independently and fearlessly, when to institute summary contempt proceedings to stop what it believes to be the unauthorized practice of law. Indeed, it was in the public interest that the Association instituted such proceedings against plaintiff Dacey. True this plaintiff there prevailed but the question was obviously a close one and it is in the public interest that such questions be finally decided, whatever be the decision.

Since fear of lawsuits for damages would seriously hamper the Association in making determinations whether or not to institute proceedings to stop what is believed to be the unauthorized practice of law, there is every reason to find that on principle the Association is immune from such suits as that at bar.

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Opinion of Wyatt, D. J. dated October 9, 1968

IV.

If (contrary to my view) the Association does not have an absolute immunity from suit, it must at least have the same immunity as a peace officer, an immunity described by the Supreme Court of the United States as follows (*Pierson* v. *Ray*, above, at 555):

> "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."

The judgment against plaintiff by Mr. Justice Marks affirmed by vote of four justices of the Appellate Division seems conclusive evidence of the existence of probable cause for institution of the proceeding by the Association, despite later reversal of the judgment. Our Court of Appeals has so declared (*Salvage Process Corp.* v. *Acme Tank etc.*, 104 F. 2d 105, 107 (1939):

> "The granting of a final injunction, despite reversal on appeal, is conclusive evidence of probable cause."

V.

Aside from the first claim for money damages, there is a second claim for an injunction against cooperation by the Association with groups in other jurisdictions to obtain relief similar to that sought in New York. This claim must fail for the reason that there are no averments that the Association is in any way threatening any such action.

The motion is granted and the Clerk is directed to enter judgment dismissing the action for failure of the amended

complaint to state a claim upon which relief can be granted.

So Ordered.

Dated: New York, New York
October 9, 1968

Inzer B. Wyatt
United States District Judge

Amendment Dated October 11, 1968 to Opinion

Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, Plaintiff,

-v-

New York County Lawyers' Association, Defendant.

67 Civ. 3021

The second sentence of the second paragraph on page 2 in part I of the opinion and order filed October 9, 1968, is amended to read as follows:

> "The members of the Association are lawyers practicing in New York County; there are many such members and it is believed to be the largest local bar association in the United States."

So Ordered.

Dated: October 11, 1968

Inzer B. Wyatt
United States District Judge

Judgment of the United States Court of Appeals

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 3021

NORMAN F. DACEY and NORMAN F. DACEY doing business as NATIONAL ESTATE PLANNING COUNCIL,

Plaintiff,

against

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Defendant.

The defendant having moved pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure to dismiss the action on the ground that the amended complaint fails to state a claim upon which relief can be granted, and the said motion having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on October 9, 1968, having handed down its opinion granting the motion, it is

ORDERED, ADJUDGED and DECREED: That the defendant New York County Lawyers' Association have judgment against the plaintiffs Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, dismissing the action on the ground that the amended complaint fails to state a claim upon which relief can be granted.

Dated: New York, N. Y.
October 10, 1968

John J. Olear, Jr.
Clerk

Memorandum Decision-Opinion

of the Court of Appeals

21 N.Y.2d 694

In the Matter of the Petition of NEW YORK COUNTY LAWYERS' ASSOCIATION, Respondent, v. Norman F. DACEY, et al., Appellants.

Court of Appeals of New York.

Dec. 29, 1967.

Appeal from Supreme Court, Appellate Division, First Department, 28 A.D.2d 161, 283 N.Y.S.2d 984.

Proceeding was brought by New York County Lawyers' Association against author of book entitled "How to Avoid Probate!", and the publishers, distributors, and sellers of the book pursuant to the Judiciary Law, Consol.Laws, c. 30, § 750, subd. B, to punish them for contempt and for an injunction for the unlawful practice of law.

The Supreme Court, Special Term, New York County, 54 Misc.2d 564, 282 N.Y.S.2d 985, entered a judgment adjudging the author guilty of criminal contempt because of the allegedly unlawful practice of law, fining him, and granting an injunction against him and the publishers, distributors, and sellers of the book.

The Appellate Division, 28 A.D.2d 161, 283 N.Y.S.2d 984, by a divided court, entered an order November 15, 1967 which affirmed the judgment as to the author and modified the judgment, on the law, as to the publishers, distributors, and sellers by limiting injunction granted against the publishers, distributors and sellers so as to restrain from the publication, distribution and sale in New York, and from advertising or soliciting purchases of the book in New York. Stevens, J., dissented, on ground that it could not be claimed that the publication of a legal text which purported to say what the law is amounts to legal practice, and that the mere fact that the principles or rules stated in the text may be accepted by a particular reader as a solution to his problem, does not affect the matter, and that the publication of a multitude of forms for all manner of legal situations is a commonplace activity and their use by the Bar and public is general, and that the conjoining of the text and the forms with advice as to how the forms should be filled out does not constitute the unlawful practice of law, and that the order appealed from should be vacated on the law and the petition should be dismissed.

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The author, publishers, distributors and sellers appealed to the Court of Appeals.

Daniel M. Shientag, New York City, for petitioner respondent.

Arthur Stephen Penn, New York City, for respondents-appellants, Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council.

Satterlee, Warfield & Stephens, New York City, for respondents-appellants, Crown Publishers, Inc., Doubleday & Company, Inc. and Brentano's Inc.

Order reversed and the petition dismissed with costs on the dissenting opinion at the Appellate Division.

All concur, except SCILEPPI, J., who dissents and votes to affirm on the prevailing opinion at the Appellate Division.

Opinion of Appellate Division

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT, SEPTEMBER 1967

HAROLD A. STEVENS, J.P.,
SAMUEL W. EAGER,
LOUIS J. CAPOZZOLI,
GEORGE TILZER,
JAMES B. M. MCNALLY, J.J.

IN THE MATTER OF THE
PETITION OF

NEW YORK COUNTY LAWYERS' ASSOCIATION,

Petitioner-Respondent,

—against—

NORMAN F. DACEY, NORMAN F. DACEY doing business as NATIONAL ESTATE PLANNING COUNCIL, CROWN PUBLISHERS INC., DOUBLEDAY & CO., INC. and BRENTANO'S INC.,

Respondents-Appellants,

for a decree pursuant to Section 750B of the Judiciary Law adjudging the respondents guilty of a criminal contempt of Court, an injunction and other relief.

Appeal from judgment of the Supreme Court at Special Term (Marks, J.), entered September 12, 1967, in New York County, which held appellant Dacey in contempt and issued a broad injunction against all appellants.

* * * *

Dissenting Opinion

STEVENS, J. (Dissenting):

I dissent, vote to reverse and dismiss the petition.

This is an appeal from an order and decree entered September 12, 1967 adjudging appellants Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, guilty of criminal contempt of court by reason of the unauthorized practice of the law. Dacey was fined $250 and upon default in payment was to be committed for thirty days. Special Term also found appellants Crown Publishers' Inc., Doubleday & Co., Inc. and Brentano's, Inc. were likewise engaged in the unauthorized practice of law. They, however, were not held in criminal contempt. All were enjoined from continuation of certain acts as set forth in the order and decree.

In 1965 Norman F. Dacey (Dacey) drafted and prepared a series of forms of various instruments consisting of *inter vivos* trust, wills and related documents. These forms were incorporated into a book entitled "How To Avoid Probate" which Dacey copyrighted under the name Norman F. Dacey doing business as National Estate Planning Council, a trade name. The book itself consists of approximately 55 pages of text and approximately 310 pages of forms. The petitioner, the New York County Lawyers' Association, brought a proceeding under Section 750(B) of the Judiciary Law to enjoin publication of the book. That section so far as pertinent provides "[T]he Supreme Court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law, and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar associa-

tion incorporated under the laws of this state." Therefore the petitioner is clearly entitled to bring the proceeding. Dacey, a Connecticut resident, was served in Connecticut under CPLR 302, our long arm statute, on the theory that he allegedly committed tortious acts in New York in writing and causing the book to be published and advertised in New York. It might be noted at this point that Dacey had previously been enjoined in Connecticut (see *Grievance Committee of the Bar of Fairfield County* v. *Norman F. Dacey, et al.*, 154 Conn. 129, 222 A. 2d 339, appeal dismissed sub nom. *Dacey* v. *Grievance Committee*, 387 U. S. 938). That injunction was the outgrowth of a 30-page booklet written by Dacey describing a so-called "Dacey Trust", the first six pages of which contained general information about the history and uses of the *inter vivos* and testamentary trusts and tax information. The balance of the booklet was a description of the Dacey trust and its claimed advantages. The booklet was supplied to prospective customers who met with Dacey and whom he advised and supervised in the filling of the blanks in the forms, and in some instances Dacey supplied forms which varied somewhat from those in the book.

Here the claim of unauthorized practice of law rests upon the writing and publication of this book of which some 600,000 copies have been sold. Petitioner complains also of the advertising which appears on the jacket of the book. The advertising in question refers to Dacey as one of America's leading professional estate planners. The book, as the title indicates, attempts to inform the purchaser how to avoid probate.

Petitioner asserts that by the appellants' representations to the public they were selling legal advice and they were representing that Dacey was an expert qualified and competent to give such legal advice. Petitioner alleges the

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scheme and plan created by Dacey, and carried into effect by Crown Publishers, Inc., who published the book, and Doubleday & Co., Inc. and Brentano's, Inc., who sold and distributed the book, constitute the unauthorized practice of law; that Crown, Doubleday and Brentano's are equally responsible because they have been engaged in aiding and abetting the unauthorized practice of law and that an injunction may issue under 750(B) of the Judiciary Law, which section they assert is clear and unambiguous.

Dacey contends that his acts cannot, as a matter of law, constitute the unauthorized practice of law in the absence of proof of the giving of specific advice to a specific individual about his particular problems; that the publication and distribution of a book containing forms is not the equivalent of giving specific advice to specific individuals about their particular problems, and does not constitute the unauthorized practice of law.

The defendants urge several defenses based on contentions that Section 750(B) violates different articles of the federal constitution. In the view taken it is not necessary to consider these contentions, and attention is directed only to the question of whether the publication of this book constitutes practice of the law within the meaning of the section.

Stripped of the arguments and the contentions of the various parties, the question may be briefly and baldly expressed: Does the writing, publication, advertising, sale and distribution of "How to Avoid Probate" constitute the unauthorized practice of law within the meaning of Section 750(B)? It cannot be claimed that the publication of a legal text which purports to say what the law is amounts to legal practice. And the mere fact that the principles or rules

stated in the text may be accepted by a particular reader as a solution to his problem, does not affect this. Courts and lawyers continuously use and cite texts for this very purpose. So also with forms. The publication of a multitude of forms for all manner of legal situations is a commonplace activity and their use by the bar and the public is general. In fact, many statutes and court rules contain the forms to be used in connection with them. Apparently it is urged that the conjoining of these two, that is, the text and the forms, with advice as to how the forms should be filled out, constitutes the unlawful practice of law. But that is the situation with many approved and accepted texts.

Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of legal practice—the representation and the advising of a particular person in a particular situation. The lectures of a law school professor are not legal practice for the very reason that the principles enunciated or the procedures advised do not refer to any activity in immediate contemplation though they are intended and conceived to direct the activities of the students in situations which may arise. Moreover, there is no claim here as there was in the Connecticut proceeding (*Grievance Committee of Fairfield County* v. *Dacey*, 154 Conn. 129, 222 A. 2d 339, app. dismissed sub nom. *Dacey* v. *Grievance Committee*, 387 U. S. 938) that Dacey, in effect, prepared instruments tailored to the particular needs of his customers.

Special Term referred to and placed a measure of reliance on the determination of the Connecticut court in making its own determination. In the Connecticut proceeding

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against Dacey it was determined that in addition to the preparation of a thirty-page booklet Dacey prepared trusts and wills adapted to clients' needs providing, at the same time, for large potential profits to himself in the sale of Wellington Fund shares on which he received a 6% commission. The court declared, when Dacey "prepared wills and trusts for his customers and advised, as to the desirability in their circumstances, of the specific wills or trusts so prepared for them" he engaged in the illegal practice of law. Certainly that case may readily be distinguished.

At most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.

"How to Avoid Probate" may be purchased by anyone willing to pay the purchase price. One is free to purchase or not as he wills. There is no personal reliance upon the selection and judgment of Dacey in the discretionary choice of a form adapted to the customer's needs.

It is recognized that rules for the admission of persons to the practice of law, and rules or canons regulating their conduct thereafter, are "to protect the public from ignorance, inexperience and unscrupulouness" (*People* v. *Alfani*, 227 N. Y. 334, 339). In this way, hopefully, the unqualified are excluded. The prohibition against the unauthorized practice of law has a like objective. "How to Avoid Probate" has been published and freely sold for more than one year. There is no showing in this record that this book has exploited the public or led its members astray improperly or incorrectly. In fact there is no factual evidence submitted as to the effect of the publication and sale of the book. In order to sustain petitioner's position one has to con-

clude that the book by its very nature comprises the unauthorized practice of law. "How to Avoid Probate" is, in one sense, a do-it-yourself kit. To that extent it could encroach upon the preserves of lawyers, though the present record does not give evidence of that fact. Every individual has a right to represent himself if he chooses to do so, and to assume the risks attendant upon what could prove a precarious undertaking. Those of sufficient substance to require trusts or wills for the most part are persons of some common sense and, normally, would hardly be expected to rely completely and unquestioningly upon a mass-printed form, even with accompanying instructions. However, they have a right to do so.

This book was printed prior to February 1966 by a Denver, Colorado printer and sold over 10,000 copies. We are told that to date it has sold over 600,000 copies. There would hardly be dispute that book printing and sale per se is not the practice of law. Similarly, the printing and sale of forms, including those subject to the injunction, would not per se constitute the practice of law. What then distinguishes "How to Avoid Probate" so as to bring it within the prohibition? With reference to the advertising and the representations which appear on the covers of the book, if such advertising be false or fraudulent the Penal Law affords a remedy (Revised Penal Law §190.20, formerly Penal Law §421 et seq.). Of course, the fact that an act might be a violation of Penal Law would not necessarily exclude it from consideration as a component part of an act otherwise not criminal.

Concededly the practice of law "manifestly includes the drafting of many documents which create legal rights. It does not follow, however, that the drafting of all such docu-

ments is always the practice of law" (*Oregon State Bar* v. *Security Escrows, Inc.*, 377 P. 2d 334, 337). "The practice of law is not confined to court work. It embraces the preparations of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, to conveyancing, the preparation of legal instruments of all kinds, the giving of advice to clients, and in general all action taken by them in matters connected with the law" (3 N. Y. Jur., Attorney and Client, §1; *People* v. *Alfani*, 227 N. Y. 334). In all the cases where there was a holding of unlawful practice of law there was some employment, express or implied, resulting either from contract, designation or assignment. (See, *People* v. *Alfani, supra*). It would seem logical that for one to be guilty of the unauthorized practice of law he must improperly or illegally have created or assumed such a relationship. That is not the situation before us.

The First and Fourteenth Amendments to the Constitution of the United States, and Article 1, §8 of the Constitution of the State of New York refer to and deal with the right of freedom of speech and of the press (*Grosjean* v. *American Press Co.*, 297 U. S. 233; *Near* v. *Minnesota*, 283 U. S. 697, see also 4 Blackstone, Commentaries, 11th ed. (1791) 150-152).

With respect to the publisher and distributors, the order appealed from restrains them from practicing law or holding themselves out to be qualified to practice law. It also imposes specific restraints with respect to any "forms", writings or documents. Nowhere in the order is the book "How to Avoid Probate" mentioned. The order imposes prior restraints, and imposes also an obligation of examination and determination with respect to printing and dis-

tribution of material which, reasonably, cannot be met. There is no precise definition or even clear indication of what material falls within the prohibited category. The publisher and distributors act at their peril in determining what does or does not contravene the terms of the order. They are, in effect, saddled with a foreknowledge of and responsibility for the contents of every book published or distributed by them. If the advertisements are false and misleading laws are available to punish and prevent their continuance. Certainly, no clear and present danger of public corruption or public misleading is shown to exist. The line between what may be characterized as "puffing" and intentional misleading is sometimes difficult to distinguish. But on this record I would vacate the order in its entirety as to the publishers (*cf. Smith* v. *California*, 361 U. S. 147; *New York Times* v. *Sullivan*, 376 U. S. 254).

Dacey's criticism of what he considers the high cost of probate is a right of speech to which he is entitled. Of course if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right could be subordinated for the common good and the protection of the whole. In my view this book may not be so considered. The dangerous tendency or clear and present danger doctrines (see, *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Herndon* v. *Lowry*, 301 U. S. 242; *Terminello* v. *Chicago*, 337 U. S. 1) are not here applicable. The book is not of the kind or quality to provoke disorder or incite one to public disturbance. In fact there is no substantive evil imminently threatening the public.

That it is not palatable to a segment of society which conceives it as an enroachment of their special rights hardly

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justifies banning the book. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions" (*Bridges* v. *California*, 314 U. S. 252, 270). Free and open discussion or even controversy could lead to reforms, if needed, or improvement where desirable. Books purporting to give advice on the law, and books critical of law and legal institutions have been and doubtless will continue to be published. Legal forms are available for purchase at many legal stationery stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters similarly characterized, there is no warrant for the action here taken.

The order appealed from should be vacated on the law and the petition dismissed, without costs.

FILED
FEB 27 1968
CLERK'S OFFICE

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR December 29, 19 67

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No. 582. 67

In the Matter of
the Petition of New York County
Lawyers' Association,
Respondent,
vs.
Norman F. Dacey, & ors., &c.,
Appellants.
For a decree &c.

Be it Remembered, That on the 30th day of November in the year of our Lord one thousand nine hundred and sixty-seven, Norman F. Dacey, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Arthur Stephen Penn, & ors., their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And New York County Lawyers' Association, the respondent - in said cause, afterwards appeared in said Court of Appeals by Daniel M. Shientag, its attorney.

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Whereupon, The said Court of Appeals having heard this cause argued by Mr. Arthur Stephen Penn, of counsel for the appellants Dacey, and by Mr. James F. Dwyer, of counsel for the appellants Crown, & ors., and by Mr. Daniel M. Shientag, of counsel for the respondent -, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the petition dismissed, with costs, on the dissenting opinion at the Appellate Division.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be

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Therefore, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 29, 19 67.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon

Clerk.